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IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERTO VELASCO,

Defendant and Appellant.

B266821

(Los Angeles County
Super. Ct. No.
BA420677)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bernie C. LaForteza, Judge. Affirmed.

Michael Allen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell,

Supervising Deputy Attorney General, Peggy Z. Huang,
Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Roberto Velasco in counts 3 and 5–10 of second degree robbery (Pen. Code § 211),¹ in count 11 of attempted second degree robbery (§§ 664/211), and found true the allegations that defendant had personally used a firearm as to all counts (§ 12022.53, subd. (b)).² After imposing and recalling the original 43-year sentence, the trial court sentenced defendant to 34 years 4 months in state prison.³

At issue in this appeal are the consecutive sentences the trial court imposed as to multiple offenses committed at the same time. The robberies in counts 5 and 6 were committed on one occasion, and the robbery and attempted

¹ All further statutory references are to the Penal Code unless otherwise stated.

² The jury found defendant not guilty of one additional count and was unable to reach verdicts on two other counts.

³ The sentence was computed as follows: a principal term of 13 years on count 3, consisting of the middle term of 3 years for robbery plus 10 years for the firearm enhancement; consecutive subordinate terms totaling 21 years 4 months in counts 5, 6, and 9–11, consisting of one third the midterm on the substantive charges enhanced by one third the midterm on the firearm use findings; and concurrent sentences in counts 7 and 8.

robbery in counts 10 and 11 took place on another occasion. Defendant's primary argument on appeal is that the court abused its discretion in imposing consecutive terms in counts 6 and 11. He also argues trial counsel was constitutionally inadequate based on a failure to object to the trial court's reliance on improper factors in aggravation of punishment in imposing consecutive sentences. We affirm.

FACTS⁴

Between January 2, 2014, and January 21, 2014, defendant robbed seven people and attempted to rob another. These crimes were committed in a similar fashion: wearing a hooded sweatshirt or hat, defendant surprised the victims at night as they were walking down the street alone or in pairs. Defendant pointed his gun at each of the victims and demanded their belongings, including cell phones. After committing the offenses defendant entered the passenger side of a waiting vehicle and sped away with his accomplice.

Counts 5 and 6

On January 5, 2014, defendant robbed Liset Flores (count 5) and Christina Ponce (count 6) as they walked down

⁴ Given the focus of defendant's contentions on appeal, we begin the facts with the events supporting the convictions in counts 5–6 and 10–11.

the street. Defendant's accomplice, driving an SUV, pulled up next to the women. Defendant exited the SUV and pointed his gun at each woman, stealing their purses and Ponce's cell phone.

Counts 10 and 11

On January 2, 2014, defendant robbed Michelle Wagner (count 10) and attempted to rob her daughter Nicole (count 11) as they walked to a grocery store. Defendant jumped out from between cars, first turning his gun to Michelle. He took Michelle's cell phone and her purse, which contained Nicole's rent money. He then turned his gun to Nicole, demanding a cell phone, which she did not have. Defendant left in a waiting car.

Remaining Counts

About an hour after robbing Michelle Wagner, defendant exited a car driven by his accomplice and robbed Efren Lopez (count 3) at gunpoint of his cell phone and money.

On January 9, 2014, defendant robbed Rebecca McTavish (count 7) and her boyfriend Jason Woliner (count 8) as they walked to a party. Defendant's accomplice drove up next to McTavish and Woliner. Defendant exited the vehicle, "chambered a round," pointed his gun at the couple, and demanded their belongings. Defendant took McTavish's

backpack, including her cell phone, and Woliner's cell phone.

On January 21, 2014, defendant robbed Alexandra Oliver (count 9) as she walked down an alley. Defendant emerged from the passenger side of a car and pointed a gun at Oliver. She threw her bag at him and dropped to the ground. Defendant asked if she had a cell phone in her bag. She replied, "Yes." Defendant took her bag, got back into the car, and fled the scene. Oliver memorized the license plate number of the fleeing vehicle and reported the robbery to the police.

Additional Evidence

The car described by Oliver belonged to defendant's sister's ex-girlfriend. At the request of the police, defendant's sister called defendant and said the police would like to speak with him. The police found defendant at his home, holding a white trash bag containing four cell phones. The police searched defendant's closet and discovered \$9,000 in cash.

Defendant lived with his mother, a sister, and the sister's four young children. Defendant was unemployed at the time of the robberies and helped his father sell clothing at the Los Angeles Swap Meet on Sundays. Defendant's mother denied that defendant had \$9,000 hidden in his closet.

Defendant admitted to robbing Oliver but denied involvement in the other robberies. His sister's ex-girlfriend

had given him cell phones that he sold at the Los Angeles Swap Meet, but he was not involved in the procurement of these cell phones. He became curious about how she obtained the phones. On January 21, 2014, she drove defendant to an alley, saw Oliver, and told him it was “[his] turn.” Defendant robbed Oliver, but claimed an acquaintance committed the other robberies. Defendant made a phone call to his girlfriend from jail, telling her to take the money from his closet and spend it on herself because he did not want his family to find the money.

DISCUSSION

Consecutive Sentences

Defendant contends that the trial court abused its discretion by imposing consecutive sentences on counts 6 and 11. Defendant reasons that because counts 6 and 11 “arose from the same set of circumstances, at the same time, and in the same place” as counts 5 and 10, respectively, the court’s reason for imposing consecutive sentences was invalid because counts 5 and 6, and 10 and 11, were not separate acts of violence.⁵ Defendant also contends that the

⁵ Defendant points to purported legal errors in the court’s reasoning for the sentence imposed on May 7, 2015. As the sentence imposed on May 7, 2015, was not the final sentence, we review this hearing only to the extent that the

trial court improperly weighed the sentencing factors, imposing a sentence that is inconsistent with “legitimate sentencing objectives.” Defendant claims that that the mitigating factors were “overwhelming” and the aggravating factors “almost nonexistent,” requiring a shorter term of imprisonment.

Relevant Proceedings

The May 7, 2015 Sentencing Hearing

At the May 7, 2015 sentencing hearing, the court “consider[ed] the probation report, the People’s sentencing memorandum” and “evidence taken at the trial.” The Wagners made statements explaining the lasting fears they suffer resulting from defendant pointing a gun at them and how defendant’s actions changed their lives.⁶ McTavish

trial court relied on the statements and arguments presented at that time.

⁶ Michelle Wagner described how her life had changed as a result of the robbery and her hope to heal with time. She is terrified to walk after dark and suffers panic attacks. She pictured life without her daughter, or her daughter being terribly injured. She has nightmares and headaches several times a month.

Nicole Wagner explained the fear she felt when defendant pointed the gun toward her. She lived in poverty

provided a letter, asking the court for “leniency in sentencing” and requesting that defendant be given “a chance to be a contributing member to the community, and a very lengthy prison sentence will not allow that.”

Six of defendant’s family members and two family friends gave statements asking for leniency because defendant was young, was the only father figure to his sister’s four young children, and had acted under financial pressure during a period of unemployment. They also requested that the court give defendant a second chance so he could rehabilitate himself. Defendant made a statement, saying he regretted his actions, but he “didn’t think it’s right that everything be put on [him]” and that going to jail was “not worth it.”

Defense counsel asked the trial court to impose a principal term of 15 years, composed of the high term of five years plus a 10-year enhancement for use of a firearm, and for the remaining sentences to run concurrently. Counsel argued that a shorter sentence was warranted because defendant was only 19 years old “and virtually a kid” at the time of the offenses, the crimes happened over a 20-day period, and no actual physical harm had been done to the victims. When asked by the court to address its discretion to run the sentences concurrently, defense counsel argued for concurrent sentences because the purpose of sentencing is rehabilitation, defendant should be allowed “a second

and suffered eviction after defendant robbed her of her rent money.

chance,” and the court’s tentative sentence of running all the counts consecutively “is basically a life sentence.”

The prosecutor argued there were insufficient mitigating circumstances to justify concurrent sentences. The prosecutor believed that the only factor in mitigation—defendant’s minimal criminal history—was negated by the number of criminal acts he committed. Defendant showed no real remorse or acceptance of responsibility.

The court sentenced defendant to 43 years in state prison. It selected count three as the principal term and imposed the middle term of three years plus ten years on the firearm enhancement. The court selected the middle term because “the factors in mitigation and aggravation are substantially in balance.” It imposed consecutive sentences for the remaining counts, noting it was exercising its discretion to run the sentences consecutively because of the high degree of violence (counts 6 and 11), the separate nature of the offenses (counts 5, 7, 9, and 10), and multiple victims (count 8).

The July 28, 2015 Sentencing Hearing

On June 5, 2015, during an unreported chambers conference, the trial court invoked section 1170, subdivision (d), and recalled and vacated the sentence imposed on May 7, 2015. The court held a second sentencing hearing on July 28, 2015, incorporating the material previously received and arguments made. The court indicated that it “reconsidered

the sentence of 43 years and reconsidered the statements -- victim impact statements provided by the People as to Rebecca . . . McTavish.” The court reduced defendant’s sentence to 34 years 4 months by imposing concurrent sentences in counts 7 and 8. It again selected count 3 as the principal term, imposed the middle term sentence, and imposed a consecutive sentence for the firearm enhancement. The court imposed consecutive sentences in counts 5, 6, 9, 10, and 11 because of “the separate nature of the offenses.”

Analysis

A trial court has discretion when choosing to impose a concurrent or consecutive sentence for an offense. (§ 669, subd. (a); *People v. Sandoval* (2007) 41 Cal.4th 825, 850.) A single aggravating factor may justify consecutive sentences. (*People v. Davis* (1995) 10 Cal.4th 463, 552; *People v. King* (2010) 183 Cal.App.4th 1281, 1323–1324.) The criteria affecting the decision to impose consecutive rather than concurrent sentences include the following: “Facts relating to the crimes, including whether or not: [¶] (1) The crimes and their objectives were predominantly independent of each other; [¶] (2) The crimes involved separate acts of violence or threats of violence; or [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.” (Cal. Rules of Court, rule 4.425

(a)⁷; *People v. Thurs* (1986) 176 Cal.App.3d 448, 451–452 (*Thurs*) [consecutive sentence not an abuse of discretion where defendant committed robbery of two victims at the same time and place].) “A trial court’s decision to impose a particular sentence is reviewed for abuse of discretion and will not be disturbed on appeal ‘unless its decision is so irrational or arbitrary that no reasonable person could agree with it.’ [Citation.]” (*People v. Jones* (2009) 178 Cal.App.4th 853, 860–861; accord, *People v. Bradford* (1976) 17 Cal.3d 8, 20.)

Defense counsel did request concurrent sentences be imposed, but he did not expressly object on the ground that the court relied on an improper factor in aggravation when imposing consecutive sentences. To the extent defendant argues the court relied on an improper factor in aggravation to support the consecutive sentences, the issue is forfeited due to the lack of a timely objection. “[C]omplaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal.” (*People v. Scott* (1994) 9 Cal.4th 331, 356 (*Scott*)). “Routine defects in the court’s statement of reasons are easily prevented and corrected if called to the court’s attention.” (*Id.* at p. 353.) The rule announced in *Scott* applies “to claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices. Included in this category

⁷ Subsequent citations to rules are to the California Rules of Court.

are cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or give a sufficient number of valid reasons.” (*Ibid.*)

Even if the issue had been preserved, it fails on the merits. As noted above, only one aggravating factor is required to support a consecutive sentence. The court here relied on “the separate nature of the offenses committed” to justify consecutive sentences. Defendant’s contention that this is an inappropriate basis for consecutive sentences as to the offenses against two victims on one occasion is wrong as a matter of law. California law has long recognized that violent crimes against multiple victims may be separately punished. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1212; *Neal v. State of California* (1960) 55 Cal.2d 11, 20–21, disapproved of on another ground in *People v. Correa* (2012) 54 Cal.4th 331 and superseded by statute on another ground as stated in *People v. Salmorin* (2016) 1 Cal.App.5th 738; *Thurs, supra*, 176 Cal.App.3d at p. 452 [“When there are several victims, an act of violence is separate when it exposes one of the victims to a risk of injury that is not shared by the others”].) Defendant cites no contrary authority.

The trial court’s findings in this case fall squarely within rule 4.425 (a)(2). The offenses in counts 6 and 11, although committed at the same time as counts 5 and 10,

respectively, involved separate acts of violence or threats of violence when defendant pointed his gun at each of the victims.

Defendant's claim that the imposition of consecutive sentences in counts 6 and 11 was an abuse of discretion because the mitigating circumstances overwhelmed the circumstance in aggravation is no more than a request that we reweigh the evidence and impose our judgment over that of the trial court. This is not our function. (*Scott, supra*, 9 Cal.4th at p. 355 [appellate court cannot "reweigh valid [sentencing] factors bearing on the decision below"].) While there were arguable circumstances in mitigation, which the trial court understood, rejection of those circumstances was not unreasonable as a matter of law.

For example, defendant argues that "precedents of the United States Supreme Court make it plain that Velasco's age meant that he was less culpable and more capable of rehabilitation," citing to *Miller v. Alabama* (2012) ___ U.S. ___ [132 S.Ct. 2455], *Graham v. Florida* (2010) 560 U.S. 48, and *Roper v. Simmons* (2005) 543 U.S. 551. These Supreme Court authorities do not apply to defendant, who is not a minor. (*People v. Perez* (2016) 3 Cal.App.5th 612, 618; *People v. Argeta* (2012) 210 Cal.App.4th 1478, 1482; *People v. Abundio* (2013) 221 Cal.App.4th 1211, 1220–1221.) The trial court was well aware of defendant's age at sentencing as defense counsel frequently pointed to defendant's relative youth, but in the end the court determined the counts in question warranted consecutive sentences.

Equally unpersuasive is the argument that defendant's crimes were committed so closely in time as to indicate a single period of aberrant behavior. (Rule 4.425 (a)(3).) The trial court could reasonably conclude that defendant's multiple offenses, spanning 20 days and involving multiple offenses at different locations, was not aberrant behavior. Defendant did not voluntarily cease his criminal activity. (Rule 4.423 (b)(3) [a defendant's voluntary acknowledgement of wrongdoing before arrest or at an early stage of proceedings is a factor in mitigation].) He was captured shortly after his final robbery, as a result of Oliver reporting the license plate number of the getaway car to the police. Even after the Oliver robbery, defendant engaged in behavior inconsistent with an offender seeking to end a brief period of criminality. Defendant was captured as he attempted to throw away stolen cell phones, called his girlfriend from jail and urged her to remove \$9,000 from his residence, and complained at sentencing that it was unfair "that everything be put on me."

Defendant argues that no victim was physically injured, but this circumstance did not compel the trial court to impose concurrent sentences. None of the victims offered physical resistance when confronted by defendant at gunpoint. The exercise of prudent judgment by victims held at gunpoint and the absence of gratuitous violence by defendant is not the type of mitigation that requires concurrent sentences as a matter of law. The argument also overlooks the harm done by defendant, as evidenced by the

statements of Michelle and Nicole Wagner describing their ongoing fears and the trauma caused by defendant.

Ineffective Assistance of Counsel

Defendant contends that trial counsel abdicated his duty to object “when the court relied on improper factors to consecutize [defendant’s] sentence.” Defendant also faults counsel’s failure to argue that “the United States Supreme Court precedents . . . explained why [defendant’s] youth and circumstances were such strong mitigating factors.”

As explained above, the premise of these contentions is incorrect—the trial court properly found a circumstance in aggravation, and the Supreme Court precedents did not apply to defendant. “Because there was no sound legal basis for objection,” defendant “cannot establish ineffective assistance” of counsel at sentencing. (*People v. Cudjo* (1993) 6 Cal.4th 585, 616.) Defendant has failed to establish deficient conduct by counsel or prejudice; his claim of inadequate representation therefore fails. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688.)

DISPOSITION

The judgment is affirmed.

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

KUMAR, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.